ZAINAL AHMAD

v.

MALAYAN BANKING BERHAD

HIGH COURT MALAYA, SHAH ALAM
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: 12-53-1993]
20 FEBRUARY 1998

CIVIL PROCEDURE: *Summary judgment - Appeal - Overdraft facility secured by letter of guarantee - Continuing guarantee - Liability of guarantor - Whether letter of guarantee defective - Claim for interest - Subordinate Courts Rules 1980, O. 26A*

CIVIL PROCEDURE: *Pleadings - Forgery and fraud - Particulars of forgery and fraud not pleaded - Whether fatal - Subordinate Courts Rules 1980, O. 14 r. 18(1)(a)*

CONTRACT: *Guarantee - Continuing guarantee - Liability of guarantor - Overdraft facility secured by letter of guarantee - Whether there was variation in terms of contract - Whether letter of guarantee defective - Whether guarantor to be discharged - Contracts Act 1950, s. 86*

The plaintiff bank had claimed from the fourth defendant RM30,000, being the balance amount of a loan granted by the plaintiff to the 1st and 2nd defendants, and interest thereon at the rate of 9% on monthly rest. The fourth defendant was the second joint guarantor for the said loan. In consequence, on 19 November 1985, a judgment in default was obtained by the plaintiff against the fourth defendant.The learned Sessions judge, in allowing summary judgment under O. 26A of the Subordinate Courts Rules 1980, however, had disallowed the plaintiff's claim for interest aforesaid.

The fourth defendant appealed against the decision allowing summary judgment, while the plaintiff cross appealed against the refusal to allow its claim for interest. Before the learned appellate judge, the fourth defendant argued, *inter alia*: (i) that the rate of interest of 9% was only entered into the letter of guarantee subsequent to its execution by him and without his approval, and the guarantee was therefore defective in law and in fact (ii) that the plaintiff had without his approval changed the account number from 6070 to 3868, and as such change constituted a material variation in the terms of the contract between the plaintiff and the principal borrowers, he should therefore be discharged under s. 86 of the Contracts Act 1950 ('the Act'). The fourth defendant had also alleged forgery on the part of the plaintiff. Forgery, however, had not been specifically pleaded by the fourth defendant/appellant.

Held:

[1] Section 86 of the Act has no relevance as the appellant had not advanced evidence that there had been a variance in the terms of the contract entered into between the borrowers and the plaintiff.

[2] The appellant had not specifically pleaded and particularised its allegation of forgery, tampering and fraudulent act by the plaintiff as required under O. 14 r. 18(1)(a) of the Subordinate Courts Rules 1980. The allegations cannot therefore be accepted by the court as parties are bound by their pleadings.

[3] The defendant had failed to adduce evidence that the plaintiff had changed the account number from 6070 to 3868 or that there was a manifest error in the certificate of indebtedness. Neither the 1st, 2nd nor 3rd defendant had made any allegation on the change of account number.

[4] There is one and only one letter of guarantee executed by the appellant jointly with the 3rd defendant with interest at the rate of 9% per annum and the letter of guarantee had always been valid in law.

[Appeal dismissed; plaintiff's cross appeal allowed.]

Case(s) referred to:
Anjalai Ammal & Anor v. Abdul Kareem [1969] 1 MLJ 22 ***(refd)***
Chen Heng Ping & Ors v. Interdagang Bankers (M) Bhd [1995] 3 CLJ 690 ***(refd)***
Gimstern Corporation (M) Sdn Bhd v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123 ***(refd)***
State Government of Perak v. Muniandy [1986] 1 MLJ 490 ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 86
Subordinate Courts Rules 1980, O. 14 r. 18(1)(a), O. 26A

For the appellant - M/s GT Rajan & Co
For the respondent - M/s Yacob & Partner

Reported by Ling Hea Hoon

JUDGMENT

Faiza Tamby Chik J:

This is an appeal by the 4th defendant against the decision of the learned Session's judge given on the 20 April 1991 in allowing the plaintiff's claim for summary judgment pursuant to O. 26A of the Subordinate's Courts Rules 1980 for the sum of RM30,000 and disallowing the claim for interest of 9%

p.a. on monthly rests from 31 May 1985 till date of realisation (See order dated 23 April 1991 – p. 50 of the appeal record.)

The plaintiff by their statement of claim dated 6 August 1985 at paras. 7, 8, 9, 10 and 11 (See statement of claim pp. 22-26) claim against the appellant as a guarantor on a continuing guarantee dated 17 June 1980 [See letter of guarantee pp. 38-41], the sum of RM30,000 only with interest at the rate of 9% p.a. on monthly rest thereon from 31 May 1985 till date of realisation for the balance amount of a loan lent by way of an overdraft facility to the 1st defendant Ismail bin Sekak and 2nd defendant Jaafar bin Ngadiman both t/a as Syarikat Sisma.

The plaintiff obtained judgement in default dated 28 October 1985 against the 1st and 2nd defendant who are the principal borrowers and against the appellant as a second joint guarantor. (See judgment dated 28 October 1985).

The judgement in default dated 19 November 1985 was also entered against the appellant. (See Order dated 19 November 1985 p. 41).

The judgement in default against the 4th defendant was however set aside.

From the documents filed herein the 4th defendant has absolutely abandoned grounds 2, 4, and 5, and is only pursuing with grounds 3, 6, and 7 respectively in the memorandum of appeal. (See p. 34)

The 4th defendant's contention is that the rate of interest was not entered in the letter of guarantee but entered as 9% subsequent to the execution of the letter of guarantee and which material alteration was done without the approval of the 4th defendant and therefore it was defective in law and in fact, and further alleges that there was a change of the account number from 6070 to 3868 which was also done without the defendant's approval and therefore the 4th defendant should be absolutely discharged under s. 86 of the Contracts Act 1950 in that there has been a variance in the term's of the contract entered into between the 1st and 2nd defendant and the plaintiff.

It is submitted that the contention is misconceived as s. 86 of the Contracts Act 1950 has no relevance because the 4th defendant has not advanced evidence that there has been a variance in the terms of the contract entered into between 1st and 2nd defendant with the plaintiff. The letter of guarantee was executed by the 4th defendant jointly with the 3rd defendant in favour of the plaintiff and not entered into between the 1st and 2nd defendant and the plaintiff.

There is one and only one letter of guarantee dated 17 June 1980 executed jointly by the 4th defendant with the 3rd defendant to guarantee payment to the limit of RM30,000 only with interest at the rate of 9% per annum and there is no other letter of guarantee (See pp. 38-40 marked as exh. "amaw 3") in the affidavit of the plaintiff dated 22 September 1988 (See pp. 31-36). The 4th defendant again has failed to adduce evidence that the letter of guarantee dated 17 June 1980 exh. as "za 1" (See pp. 47-48) in the 4th defendant affidavit dated 1 November 1988 (See pp. 44-46) is not the one and the same letter of guarantee as "amaw 3" (See pp. 38-40).

The 4th defendant in his affidavit dated 1 November 1988 at para 5, (See pp. 44-45) alleges forgery, tampering and fraudulent act by the plaintiff but the 4th defendant has not specifically pleaded and particularised such allegations as required under O. 14 r. 18(1)(a) of the Subordinate's Court's Rules 1980 which provides:

> 18.(1) Subject to paragraph (2), every pleading must contain the particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words -
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

The allegations cannot therefore be accepted by the court as parties are bound by their pleadings.

In *State Government of Perak v. Muniandy* [1986] 1 MLJ p. 490 at p. 491 it was held:

> it was not pleaded in this case that there was a prohibition affecting employees of the appellant and that the driver had allowed the respondent to travel in the lorry in breach of such prohibition. Parties are bound by their pleadings and the appellant should not, on the admitted facts of the case, be allowed to avoid vicarious liability merely on the bare fact that there was an administrative circular relating to the prohibition.

In *Anjalai Ammal and Anor v. Abdul Kareem* [1969] 1 MLJ 22: at p. 25 it was stated that:

> There is considerable authority in regard to the purpose and effect of particulars filed pursuant to O.19, r. 7A of the Rules of the Supreme Court. At p. 31 of *Halsbury* (3rd edn) vol. 3 the learned commentator has this to say:
>
> A party is bound by his pleadings unless he is allowed to amend them and he is therefore bound by his particulars, which are in effect part of the pleadings under which they are delivered.

In *Thomson v. Birkley* Watkin Williams J says:

> The object of particulars is to prevent surprise, and to limit and particularise events in order that both parties should come to trial, fully prepared for the issues.

In *Spedding v. Fitzpatrick* Cotton LJ says:

> The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise.

In *Thorp v. Holdworth Jessel* MR says:

> The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of Order XIX was to prevent the issue being enlarged, which would prevent either party from knowing and when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

Finally, in *Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington* Lindley LJ says:

> What is the effect of these particulars? I take it the effect of these particulars is this, that the issues to be tried are limited by these particulars in the first instance. I do not mean to say that leave cannot be obtained to add to the particulars - of course it can; but the moment these particulars are delivered, and until some further order is obtained for the delivery of further particulars, the effect of delivering the particulars is to cut down the matters in question in the action to the particulars.

In *Gimstern Corporation (M) Sdn Bhd v. Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302: it was held that:

> (2) the issues brought up at the trial had not been pleaded in the statement of defence and therefore the contention should not have been entertained.

In *Yew Wan Leong v. Lai Kok Chye* 1990 2 MLJ p. 152: it was held that:

> (1) As the trial court had made a decision on an issue which was not raised by the parties, in their pleadings, the appeal must be allowed and the order of the learned judge in dismissing the plaintiff's claim be set aside.

The letter of guarantee dated 17 June 1988 executed by the appellant relates only to a/c No. 3868 for the overdraft facility of RM30,000 lent to the 1st and 2nd defendants by the respondent with interest at the rate of 9% p.a. and to no other account. Judgment dated 24 October 1986 was entered against the

1st and 2nd defendants who are the principal borrowers and in particular judgement dated 19 November 1985 was also entered against the 3rd defendant who is the joint guarantor with the appellant on the same account No. 3868 having the same interest rate and no such allegation has been made by either or 1st, 2nd & 3rd defendants on the alleged change of account number. The defendant again has failed to adduce evidence that the plaintiff has changed the a/c Nos. from 6070 to 3868 or that there is a manifest error in the certificate of indebtedness. In *Chen Heng Ping @ Tian Seow Hock & 5 Ors v. Interdagang Bankers (M) Bhd* [1995] 2 AMR 1655, it was held that:

(a) Although guarantors are contractually precluded from requiring the bank to prove the accuracy of the certificate, the guarantors are not prevented from adducing evidence to show that there is a manifest error or fraud, on the face of the certificate [See p. 1662 lines 26-32];

(b) The contractual provision in the guarantee does not bind the court. Where there is evidence which casts doubts on the accuracy of the certificate, the court should not accept the certificate as conclusive. The lender must prove the quantum of the debt claimed in accordance with the requirements of the Evidence Act 1950. [See p. 1662 lines 32:37];

(c) In this case, there is no evidence of a manifest error on the face of the certificates. Therefore, a fishing expedition for errors, in the guise of an application for further and better particulars, is unwarranted [See p 1662 Lines 3946].

The plaintiff's cross-appeal is against the learned Sessions Judge's decision in disallowing the plaintiff's claim that the defendant pay interest at the rate of 9% p.a. on monthly rest from 31 May 1985 till date of realisation.

In this case there is one and only one letter of guarantee dated 17 October 1980 executed by the 4th defendant jointly with the 3rd defendant with interest at the rate of 9% per annum and the letter of guarantee is and has always been valid in law.

In the circumstances the appeal of the 4th defendant is dismissed with cost and the plaintiff's cross-appeal for the interest at the rate of 9% per annum from 31 May 1985 till date of realisation is allowed with costs.